89-1276

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DEBBIE BLOMMAERT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, THIRD JUDICIAL DISTRICT

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(1a) QUESTION PRESENTED

1. Whether the State Appellate Court denied defendant her right of confrontation as to the sole witness to present evidence of defendant's "prior bad acts" and "guilty knowledge" by limiting cross-examination as to that witness' participation in a lawsuit against defendant and her husband; the Appellate Court denied defendant her constitutional rights, when although finding that a denial of confrontation occurred, it held the error to be harmless upon a standard inapplicable to constitutional violations and not according to this Court's holding in Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674, 106 S.Ct. 1431 (1986).

(1b) PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Debbie Blommaert, was the defendant in the Circuit Court of Will County, Illinois, appellant in the Appellate Court of Illinois, and petitioner in Petition for Leave to Appeal filed in the Supreme Court of Illinois. Respondent, People of the State of Illinois, was plaintiff in the Circuit Court of Will County, Illinois, appellee in the Appellate Court of Illinois, and respondent in the Supreme Court of Illinois.

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1. The State Appellate Court denied defendant her right of confrontation as to the sole witness to present evidence of defendant's "prior bad acts" and "guilty knowledge" by limiting cross-examination as to that witness' participation in a lawsuit against defendant and her husband; the Appellate Court denied defendant her constitutional rights, when although finding that a denial of confrontation occurred, it held the

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error to be harmless upon a standard inapplicable to constitutional violations and not according to this Court's holding in Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674, 106 S.Ct. 1431 (1986). 13

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C. Illinois Supreme Court Order denying Petition for Leave to Appeal, dated December 5, 1989. App. 41

(1d) Opinion Below

The Illinois Appellate Court's Opinion in this cause is People v. Blommaert, 184 Ill.App.3d 1065, 541 N.E.2d 144, 133 Ill.Dec. 307 (1989).

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Petitioner, Debbie Blommaert (hereafter, defendant), prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court for the Third District, affirming her conviction and sentence for first degree

murder, in violation of Ill. Rev. Stat. 1987, Ch. 38, par. 9-1(a)(2), leave to appeal having been denied by the Illinois Supreme Court.

Judgment, Opinion and Order Below

The Opinion of the Appellate Court of Illinois, Third Judicial District, affirming the trial court judgment, is set out as Appendix A. The Order of the Appellate Court of Illinois, Third Judicial District, denying Petition for Rehearing, is set out as Appendix B. The Order of the Illinois Supreme Court, denying Petition for Leave to Appeal, is set out as Appendix C.

Jurisdictional Statement

On July 12, 1989, the Illinois Appellate Court, Third Judicial District, filed its Opinion affirming the judgment of the Circuit Court of Will County, Illinois. (App. A) A Petition for Rehearing, timely filed, was denied on July 11, 1989. (App. B) Defendant's Petition for Leave to Appeal, timely filed, was denied by the Illinois Supreme Court on December 5, 1989. (App. C) This Petition is timely filed within 60 days thereafter. Jurisdiction is invoked under 28 U.S.C. 1257(3) and Rules 20.1 and 29 of this Court.

Constitutional Provisions

AMENDMENT [VI]

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....

AMENDMENT [XIV]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall ... deprive any person of ... liberty, without due process of law....

Statutes

Ill. Rev. Stat., Chap. 38, Sec. 9-3

Involuntary Manslaughter . . . (a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his

acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly . . . .

Ill. Rev. Stat., Chap. 38, Sec. 4-6

Recklessness. A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. An act performed recklessly is performed wantonly, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

STATEMENT OF THE CASE

Nature of the Case

Petitioner, Debbie Blommaert, was found guilty of first degree murder, and sentenced to the Illinois Department of Corrections for a period of 20 years.

STATEMENT OF FACTS

Defendant, and her husband, having a four year old of their own, Justin, adopted an infant, Amy. On July 21, 1987, while defendant and her husband were leaving the office of their lawyer, defendant slipped and fell while carrying Amy, who was injured. In addition to the testimony of defendant and her husband as to this accident, there was the uncontested testimony of Attorney Nicholas Stevenson. His testimony, admitted by stipulation, (Tr. 1297) was:

> "It is stipulated between the parties that if called to testify, Attorney Nicholas Stevenson would be competent to testify that his services were retained for the purposes of completing the legal adoption of Amy Blommaert by Ronald and Debbie Blommaert.
>
> That in the afternoon of July 21, 1987, while exiting his office at 33 North Dearborn Street, Chicago, Illinois,

> Debbie Blommaert, while holding Amy in an upright manner tripped in a hole in the sidewalk and fell forward causing Amy to strike the concrete sidewalk.
>
> This witness would be further competent to testify that as a result of said fall, Amy began screaming and crying and said screaming and crying diminished and completely stopped within ten to 15 minutes." (Tr. 1297-98)

On October 12, 1987, defendant brought Amy to the hospital. The child was in a coma. She died on October 16. Defendant testified that on October 12, the child fell off a chair from a height of 30 inches. At the time, Amy cried. Later in the evening, the child became unconscious.

Dr. Blum, (called by the defense), pathologist for twenty-one counties in Northern Illinois, testified that the cause of death was accidental; that the fall could have caused re-bleeding of an

injury from July 21. Dr. Kalekar, the pathologist presented by the State, said cause of death was trauma probably caused on October 12; and the fall in July could not have caused the fatal injury.

Present in the home and at times alone with Amy was her four-and-a-half year old brother, Justin. Found on Amy's legs and arms were bite marks inflicted by Justin. (Tr. 724-25) Justin, according to State witnesses, was strong enough to break a hole through an aluminum liner of an outdoor swimming pool. (Tr. 448-49)

Defendant's husband was also in the home at the time of the child's fall on October 12.

There was no direct evidence that defendant inflicted the injury that caused death.

The State introduced the testimony of Mrs. Vraney, a neighbor, that defendant (a) roughly spanked Justin and threw him to the ground, (Tr. 547-49), and (b) did not want a social worker to see prior bruises to Amy. (Tr. 1132)

The trial court prevented the defense from cross-examining Mrs. Vraney as to her bias against defendant as evidenced by a lawsuit filed by her and her husband against defendant's husband for work he had done on the Vraney home, and about complaints made by her and her husband against defendant's husband before the Attorney General.

The Appellate Court held that such limitation, although error, i.e., it violated defendant's right of confrontation, was harmless. (App. A, pp. 29-31)

RAISING THE FEDERAL QUESTION

Defendant asserted her right of confrontation by attempting to cross-examine a witness as to her bias. The trial court limited cross-examination as to the witness' involvement with her husband in suing defendant's husband concerning work defendant's husband did at the witness' house. The violation of defendant's right of confrontation was raised in the motion for new trial. It was asserted as error in the Illinois Appellate Court. The Appellate Court held defendant had been denied the right to cross-examine the witness on bias, and that such bias "might have colored her [the witness'] testimony." (App. A, p. 29) However, the Appellate Court held this limitation of confrontation to be harmless. Although the State Appellate

Court did not expressly mention the United States Constitution, the cases cited to it and the cases it discussed demonstrate the involvement of constitutional basis. Hence, the constitutional issue was raised. See Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674, n.3, 475 U.S. at 677, n.3 (1986). That the Appellate Court's decision improperly violated defendant's constitutional right of confrontation, was raised in a Petition for Leave to Appeal to the Illinois Supreme Court. That Court denied review by order and without opinion. (App. C)

REASONS FOR GRANTING CERTIORARI

1.

The State Appellate Court denied defendant her right of confrontation as to the sole witness to present evidence of defendant's "prior bad acts" and "guilty knowledge" by limiting cross-examination as to that witness' participation in a lawsuit against defendant and her husband; the Appellate Court denied defendant her constitutional rights, when although finding that a denial of confrontation occurred, it held the error to be harmless upon a standard inapplicable to constitutional violations and not according to this Court's holding in Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674, 106 S.Ct. 1431 (1986).

The State trial court denied defendant her constitutional right of confrontation when it prevented cross-examination of a crucial State witness, Mrs. Vraney, relative to her suing defendant's husband (Tr. 452) and making complaints against him to the Attorney General. (Tr. 748, 1111-12, 515, 592, 902-16, 1268) The suit concerned masonry work that

defendant's husband had done on the Vraney home.

The trial court excluded this evidence on the basis that the complaint against defendant's husband was signed only by Mr. Vraney, and that she was not a party to the lawsuit, even though she wrote out the lawsuit (Tr. 1111-12), and did not sign her name only because she might not be able to go to court because of her responsibilities to her minor children. (Tr. 1112-13)

This was error denying defendant her constitutional right of confrontation. Mrs. Vraney was surely an interested party and would benefit from the successful lawsuit. This limitation as to her bias denied defendant her constitutional right of confrontation.

A defendant has a right to place the witness in her

> "[p]roper setting and put the weight of his testimony and credibility to a test, without which the jury cannot fairly appraise them." United States v. Alford, 282 U.S. 687, 75 L.E.2d 624, 628 (1930).

As stated in Delaware v. Van Arsdall, supra, confrontation involves the right to "expose a witness' motivation in testifying." (475 U.S. at 678-79)

This was a violation of defendant's right of confrontation because it "keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." Gordon v. United States, 344 U.S. 414, 97 L.Ed. 447, 73 S.Ct. 369 (1953) at 344 U.S. 423. Cf. Delaware v. Fensterer, 474 U.S. 15, 88 L.Ed.2d 15 (1985); Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674,

106 S.Ct. 1431 (1986). The Appellate Court agreed.[1]

The Appellate Court, having found that defendant was denied her right of confrontation, affirmed by applying an improper standard to determine if the error required reversal. (App. A, pp. 27-31)

Although limitation of confrontation can be harmless error,

> "[w]hether such an error is harmless in a particular case

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1. The Appellate Court stated:

"We agree with the defendant that she should have been permitted to question Vraney about the pending litigation and the claim filed with the Attorney General. Even though the witness did not sign the documents, the fact that she prepared them for her husband's signature and that she acknowledged her friendship with the Blommaerts had terminated as a result of the dispute indicates that this is a matter which might have colored her testimony. Therefore, inquiry into this matter should not have been foreclosed." (App. A, p. 29)

> depends upon the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674, 106 S.Ct. 1431.

The Appellate Court did not apply this constitutionally-mandated standard. (App. A, pp. 29-31) Four of the five cases relied upon by the Appellate Court do not even relate to limitations of cross-examination as to interest and bias; additionally, they relate to cases where the evidence of guilt is overwhelming. That is not the situation here. The fifth case, which does reach this issue, results in a reversal due to

improper limitation of cross-examination as to interest and bias.[2]

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2. People v. Jackson, 145 Ill.App.3d 789, 495 N.E.2d 1359 (1986), (App. A, p. 30), did not involve limitation of cross-examination by preventing inquiry into interest and bias. The court upheld the conviction because "The evidence of defendant's guilt ... was overwhelming," and any error was cured by court instruction. Ibid. People v. Larson, 82 Ill.App.3d 129, 402 N.E.2d 732, 37 Ill.Dec. 730 (1980), (App. A, p. 29), involved limitation of impeachment by prior inconsistent statement, as to a matter found by the trial court to be "irrelevant, immaterial" (402 N.E.2d at 743), and which the Appellate Court found to be on an issue "minor and totally collateral." Id. at 732. People v. Miles, 151 Ill.App.3d 485, 502 N.E.2d 737, 104 Ill.Dec. 240 (1986), (App. A, p. 31), did not involve limitation of cross-examination, but whether issues not raised in post-trial motions were plain error. The court found no error, because the evidence was not closely balanced. People v. Hunter, 124 Ill.App.3d 516, 464 N.E.2d 659, 79 Ill.Dec. 755 (1984), (App. A, p. 31), is similarly distinguishable. The sole case cited by the Appellate Court which involves a situation as here, People v. Foley, 109 Ill.App.3d 1010, 441 N.E.2d 655, 65 Ill.Dec. 520 (1982), (App. A, p. 31), resulted in a reversal because the witness was a key witness.

The Appellate Court's reliance on these totally inapplicable cases, plus its failure to discuss the issues held relevant by this Court in Delaware v. Van Arsdall, supra, demonstrates it did not apply the proper standard.

Applying the proper standard demonstrates the error was not harmless.

Here, the other evidence against defendant was circumstantial and not strong; the evidence provided by Mrs. Vraney was the sole evidence as to defendant's prior bad acts and mental state; and hence, very prejudicial; the limitation of confrontation caused the jury to have a false impression as to the relationship between defendant and Mrs. Vraney.

As the Appellate Court found (App. A, p. 37), the evidence was totally

circumstantial. The prosecution's case was not substantial. There was substantial disagreement as to whether or not cause of death was accidental; other family members, not defendant, could have caused the injury that caused death.

There was substantial disagreement between well-qualified doctors as to cause of death.[3]

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3. All experts agreed that the trauma that caused the injury was from Amy's head hitting a surface (as in a fall) and not by being struck by an object. (Tr. 311)

There was disagreement as to whether cause of death was accidental. Dr. Kalekar (no) (Tr. 317-329); Dr. Blum (yes) (Tr. 1017, 1032-33, 1048) However, even Dr. Kalekar under cross-examination admitted it is possible that Amy was injured accidentally in the fall as described by defendant. He stated:

"Q: That the fall from a 30-inch height striking the floor could have caused a subdural hemorrhage, in your opinion, that is not likely but it is possible?

A: That is correct, yes." (Tr. 881-

(Footnote continued)

The medical testimony was conflicting

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82)

There was disagreement as to whether the cause of death was due to subdural hemorrhage. State witness, Dr. Kalekar (yes) (Tr. 317-320); State witness, Dr. Mary Radowski (no); cause of death, ischemia and infraction (Tr. 1229); defense witness, Dr. Blum (no), cause of death bleeding of old injury. (Tr. 1037-38)

There was disagreement as to whether there was a skull fracture. Dr. Kalekar (yes) (Tr. 305). No picture was taken before the skull was split in autopsy. This could cause fracture (Tr. 374); only after skull sawed was picture taken. (Tr. 374) Under normal good pathology practice, as practiced by the doctor's office, a picture of any fracture is taken before skull is split. (Tr. 375) In a picture taken, fracture cannot be seen. (Tr. 365, 371) There is no picture of the fracture. (Tr. 371) The X-ray and CAT scan taken did not show skull fracture. (Tr. 385-86, 728) Dr. Blum (no) (Tr. 1009).

There was dispute as to whether an old subgaleal hemorrhage could re-bleed and cause death. Dr. Kalekar (no) (Tr. 806-07); Dr. Blum (yes) (Tr. 1030-33). Dr. Blum supported his position as to how injury could occur with articles, Literature Report by Helfer, The Journal of Pediatrics, 1977, and Kravitz in

(Footnote continued)

(App. A, p. 2) as to whether the cause of death was accidental or not; whether there was a skull fracture; whether the fall on October 12 could cause the old injury to re-bleed and cause death; whether a fall from 30 inches could cause the new injury; whether cause of death was from a subdural hemorrhage.

There was no direct evidence that defendant inflicted the blows that caused the injury.

There were others, her husband and Justin, who could have caused the

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Pediatrics, 1969. Dr. Heller, State witness, (yes) (Tr. 1041, 1047). The prosecution agreed that there is medical evidence to rebut Dr. Kalekar's opinion that children do not re-bleed. (Tr. 1106)

There is dispute as to whether a fall from a height of 30 inches could cause the injury. Dr. Kalekar (no) (Tr. 328); Dr. Blum (yes) (Tr. 1020, 1029); Dr. Kirschner (no) (Tr. 1310), but it could be caused by a 36 inch fall. (Tr. 1310-11)

injury. Significantly, the sibling, Justin, had previously acted violently toward Amy. (Tr. 723-25) She bore bite marks he had inflicted on her legs and arms. (Tr. 723-25) He was a violent child strong enough to poke holes through a metal pool.

There is no direct evidence that if defendant inflicted the blows, she did so with the mental state required for a finding of murder as distinct from recklessly that would cause the offense to be involuntary manslaughter. Ill. Rev. Stat., Chap. 38, Sec. 9-3.

Hence, the testimony of Mrs. Vraney was crucial to the prosecution's assertion that defendant purposely caused injury to Amy.

The testimony of Vraney was not cumulative. No one other than Mrs.

Vraney testified to defendant's prior mistreatment of her other child, Justin, (presented as other offense evidence, Tr. 78, 246), and to her alleged consciousness of guilt concerning prior injury to Amy. (Tr. 23, 1125-32)[4]

The prosecution argued Mrs. Vraney's testimony concerning the pool incident to the jury to demonstrate that defendant had the intent necessary to commit murder. This argument was corroborated when he told the jury that it should

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4. She testified that she heard defendant abuse her four-year-old son, Justin, (Tr. 546-47), by slapping him hard more than ten times (Tr. 547); flinging him across the floor (Tr. 547) so he slid some ten feet (Tr. 548); that defendant's abuse of him so upset her, that she cried (Tr. 549) and pleaded with defendant not to hit the child (Tr. 548) because "The pool can be replaced. The child can't." (Tr. 548); she saw defendant throw Justin to the ground in an area where the ground was rough from construction. (Tr. 549)

consider this testimony, "For the sole purpose of establishing the defendant's intent or absence of mistake with regard to Amy Blommaert's death." (Tr. 544)[5]

The error here was prejudicial, because without Vraney's testimony, there is no basis to believe that defendant would--even out of anger--cause injury to her child. Without Vraney's testimony, there was no evidence of consciousness of

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5. The prosecutor argued to the jury:

> "Also you have to show an intent here. Look to the other evidence to find that intent. And there is other evidence to show such an intention. There is the pool incident. There is the time where Amy comes up with a bruise to the side of the face where again the Defendant gives a story as to what happened and it can be considered to be not a reasonable story for the injury that this child incurred." (Tr. 1458)

guilt. The trial court recognized that evidence of this nature would hit the jury like a ton of bricks. (Tr. 155)

The State used Vraney to impeach defendant with a prior inconsistent statement (Tr. 1125-32); that defendant feared to have a social worker see other bruises on Amy (Tr. 1132)--evidence that the prosecutor asserted to the jury was evidence of consciousness of guilt. (Tr. 1458)

The Appellate Court itself found Vraney's testimony was crucial.[6]

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6. The Court stated:

> "The testimony regarding the defendant's abusive actions toward Justin provided information about the defendant's temperament and her previous reactions when a child of hers frustrated or angered her, and it was therefore relevant. The uncharged incidents of abuse were also relevant to prove the

(Footnote continued)

It was vital for defendant to be able to demonstrate Vraney's hostility. Absent such proof, the prior good relationship between the families--Mr. and Mrs. Vraney put their trailer on the defendant's land (Tr. 552), and for three weeks lived with defendant and her husband (Tr. 553)--would cause the jury to think there could be no basis for Mrs. Vraney to lie against defendant. Application of a proper constitutional

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defendant's intent and to establish lack of mistake or accident. As the State noted, there are often no eyewitnesses to acts of child abuse, which renders it difficult to identify through direct evidence the perpetrator or the exact cause of death. Instead, guilt must often be established through circumstantial evidence which may include proof of a pattern of repeated beatings or injuries...." (App. A, pp. 25-26)

standard demonstrates the error could not be harmless because: (a) the evidence of guilt was all circumstantial; (b) it was, at most, very weak; (c) the evidence of this witness was crucial in that it was the only evidence of other prior bad acts toward her child and the sole evidence of "consciousness of guilt"; (d) the limitation of cross-examination was extensive, it related to her assisting in a lawsuit against defendant and her husband and was evidence of motive for the witness to fabricate.

Defendant was denied her constitutional right of confrontation.

Certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

APPENDICES

No. 3-88-0525
IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 1989

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	) Appeal from the) Circuit Court of) Will County) No. 87-CF-1218
v.	)
DEBBIE BLOMMAERT, Defendant-Appellant.	) Honorable) William Penn) Presiding Judge

JUSTICE HEIPLE delivered the opinion of the court: Publ. In Full

The defendant, Debbie Blommaert, was charged with first degree murder (Ill. Rev. Stat. 1987, ch. 38, par. 9-1(a)(2)) following the death of her adopted baby, Amy, who was nearly 10 months old at the time of her death. When Amy was admitted to the hospital on October 12, 1987, she was suffering from hemorrhaging within her skull. She lapsed into a coma and died four days later. The defendant was

convicted following a jury trial and was sentenced to a 20 year term of imprisonment. She appeals her conviction, and we affirm.

Much of the medical testimony presented at trial was conflicting, and the record in this case is voluminous. Accordingly, the summation of the relevant proceedings and evidence is of necessity somewhat lengthy.

Prior to trial, the court heard extensive arguments regarding the admissibility of certain evidence of alleged prior abuse Amy suffered. Counsel discussed numerous bruises and scars and how they might have been sustained, as well as a collarbone fracture which the baby suffered at the age of 16 weeks. The court ruled that the evidence would not be admissible unless the State was able to show that

the defendant inflicted the injury.

Deputy Gary Kraemer of the Will County sheriff's office testified that he interviewed the defendant on October 14, 1987. The defendant told Kraemer that she and her husband adopted Amy on March 23, 1987, and that the baby was healthy at that time. She told him that the baby had recently been crabby and vomited several times. She stated to the witness that on October 12, at approximately 3:00 or 4:00 in the afternoon, she and the baby were in the kitchen about 10 feet from one another and the baby pulled herself up to a kitchen chair. Amy began chewing on a tie which secured the seat cushion to the chair. Next, the defendant told Kraemer, she heard the baby cry, looked over, and saw her lying on her back on the kitchen floor. Kraemer stated that the defendant told

him she did not hear or see the baby fall. At this time, the defendant's husband was at work and the defendant's four year old son was outside playing. The defendant indicated to Kraemer that she took the baby into the family room, and Amy became quiet.

Kraemer further testified that the defendant told him her husband arrived home at 4:15 or 4:30. He checked the back of Amy's head at the defendant's request and after she explained that the baby had fallen earlier, but neither of them felt anything unusual. At approximately 7:30 that evening, Kraemer was told in the interview, the baby became limp and apparently lost consciousness as the defendant carried her downstairs after changing her diaper. After the defendant and her husband unsuccessfully attempted to

revive Amy, they called their neighbor, who was a nurse. The neighbor continued resuscitative efforts until Amy was transported to the hospital.

Dr. Mitra Kalelkar, an assistant Cook County Medical Examiner who performed an autopsy on Amy, also testified. She stated that she noted the existence of several fresh bruises on Amy's face, left buttock, and back. In her opinion, the bruises occurred approximately four or five days before the baby died, and only two of them might have occurred as a result of medical treatment such as cardiopulmonary resuscitation (CPR).

Dr. Kalelkar further testified that during the autopsy, she discovered the baby had two hemorrhages in the subgaleal area, that is, in the inner scalp. The larger hemorrhage measured 2 1/2 inches in diameter and the smaller hemorrhage

measured one inch in diameter, and they were located in the occipital region, which is in the back of the head, toward the neck area. The witness testified that blunt trauma caused each hemorrhage, but that they were separate injuries and resulted from separate blows.

Dr. Kalelkar testified that beneath the larger subgaleal hemorrhage, she then discovered a lineal vertical skull fracture measuring seven-tenths of an inch in the left occipital bone. She indicated that in her opinion, the fracture was caused by the same blow or blows that caused the larger hemorrhage. After the baby's skullcap was removed by an autopsy technician, Dr. Kalelkar observed a large, fresh subdural hemorrhage on the right side of the brain, toward the back. She also observed an older subdural hemorrhage at

the base of the skull on the right and left sides of the brain. She explained that the subdural space lies between two of the membranes covering the surface of the brain. The doctor testified that the baby's injuries were consistent with the head being in motion and striking a stationary object, and further stated that the baby died as a result of blunt trauma. During the witness's testimony, slides taken before and during the autopsy were shown, and the witness pointed out the injuries. Dr. Kalelkar testified that in her opinion, based on a reasonable degree of medical certainty, a nine month old baby sustaining a backwards fall to a tile floor would not sustain a skull fracture and subdural hematomas such as Amy did. Finally, Dr. Kalelkar stated that a baby sustaining subdural hematomas such as those observed

would lapse into a coma in a matter of four or five hours.

On cross-examination, Dr. Kalelkar acknowledged that it was possible that the baby sustained the bruises in an accidental manner, but that it was unlikely. She also stated that she saw no evidence that Amy was grabbed or held with great force. Defense counsel established that the witness testified at an earlier proceeding that the bruises on Amy's body could have been anywhere from several hours to two or three days old.

David Gilles, a Will County deputy sheriff, testified that he was present when Dr. Kalelkar performed Amy's autopsy. He stated that when Amy's skull was exposed, the doctor pointed to a thin red line and indicated it was a fracture. After the technician removed the skullcap, Dr. Kalelkar held it up and

manipulated the fracture back and forth.

Charlotte Clark, a registered nurse, testified that Amy's right eyelid was swollen and discolored when she was brought to the emergency room for treatment.

Next, Mary Ann Burton Lewin testified that on October 28, 1987, in the course of her employment as a social worker, she had a conversation with the defendant. Lewin testified that the defendant described Amy as an irritable child who got worked up and upset to the point of throwing up. The defendant also told Lewin that for several days before Amy lapsed into the coma, she had been irritable, cried often, vomited several times, and repeatedly placed objects in her mouth as if she were teething. The witness noted that the defendant did not describe any positive qualities the child

may have possessed.

Pamela Vraney, a neighbor of the defendant's, was allowed to testify over defense objection. The court informed the jury that it should consider her testimony for the purpose of establishing the defendant's intent or absence of mistake with regard to Amy's death. Vraney testified that on June 26, 1987, her husband noticed a hole in their above-ground pool and directed her to go to the Blommaerts' residence and bring back 4-year-old Justin Blommaert, whom he suspected may have helped create the hole. After she explained this to the defendant, Vraney remained in the Blommaerts' kitchen from where she heard the defendant go to the upstairs bathroom to inquire about the incident. Vraney testified that after Justin admitted putting a hole in the pool, the defendant

began to yell and to beat him, and she heard the defendant slap him more than 10 times. Vraney said the defendant then brought the boy downstairs, clad only in his underwear, and "flung" him about 10 feet across the linoleum floor. Next, Vraney said, the defendant carried Justin to the swimming pool, threw him to the ground, and yanked and pushed him until he demonstrated what he had done. On cross-examination, Vraney stated that in the year she had known the Blommaerts, she had never seen the defendant act in any manner other than as a good mother. She also tstified that she did not observe any welts or bruises on Justin after this incident.

The defendant then presented her case in chief. She presented three doctors who observed and examined Amy on either October 12 or 13 while she was in the

hospital, and all testified that they observed no bruising on Amy's body.

The defendant also called Dr. Mitra Kalelkar. The doctor stated, as she had in her earlier testimony, that it was possible that the bruises on Amy's body could have been the result of accidents. She testified that the baby sustained the subgaleal hemorrhages at almost the same point in time, but admitted that they may have been inflicted up to a week apart. Dr. Kalelkar stated that there was no indication that the older subdural hematoma rebled and caused the newer hematoma, and further that old subdural hematomas do not usually rebleed in children.

On cross-examination, Dr. Kalelkar stated that the skullcap contains blood vessels and if it fractures while the

individual is alive, there will be a minute amount of bleeding along the fracture line. There will be no bleeding along the fracture line if the skullcap is fractured after death. While viewing a slide of the fracture she observed in Amy's skullcap, the doctor noted the red line in the fracture, which indicated the fracture was not created postmortem. The witness again stated that in her opinion, the fall described by the defendant was not sufficient to create the subdural hematomas or the skull fracture Amy suffered.

Debbie Blommaert took the stand in her defense. She testified that on July 21, 1987, while in Chicago in the company of her family and the attorney who helped them adopt Amy, she tripped and fell forward with the baby in her arms. The defendant stated that the right rear

portion of Amy's head struck the concrete. The baby cried briefly but displayed no injuries, so the Blommaerts did not seek medical attention. The parties later stipulated that if he were called, the attorney would testify that he observed the defendant trip and fall, and that Amy hit the concrete and cried for several minutes. The defendant repeated the version of events she earlier told to Deputy Kraemer regarding Amy falling in the kitchen and later losing consciousness.

On cross-examination, the defendant testified that October 12 was the first time Amy had fallen and struck anything in the kitchen. The prosecutor then inquired whether in May of 1987, the defendant fainted in the kitchen while carrying Amy, causing Amy to fall and strike a chair or table leg and sustain a

large facial bruise. The defendant denied this, and stated she did not faint. On redirect, the defendant testified that in May of 1987, she had been applying water sealant in her basement while her gas dryer was operating, when Amy awoke from her nap. The defendant stated she got Amy and was coming downstairs with her when she became dizzy in the kitchen. The defendant testified she tried to sit on the kitchen floor so she did not fall with Amy, but she fell a little forward and as a result, Amy hit the side of a chair and bruised her face.

Dr. Larry Blum, a forensic pathologist, conducted an autopsy on Amy on January 25, 1988. He testified that all of the bruises he observed could have been caused by the efforts to resuscitate Amy. After looking at a photograph of

Amy's skull, Dr. Blum testified that the line alleged by Dr. Kalelkar to be a fracture may or may not be a fracture, and even if it were, it was a fracture of the parietal bone, not the occipital bone as Dr. Kalelkar stated. He testified that small linear fractures in the parietal area are consistent with falls, and that accidental injury is more likely to occur in the parietal area rather than in the occipital area. He further stated that the larger subgaleal hemorrhage and the fracture could have been caused by the baby falling backwards.

Dr. Blum testified that the baby might have sustained the older subdural hematoma when the defendant fell with her in July of 1987. According to Dr. Blum, as part of the healing process of these hematomas, new blood vessels with thin walls form, and the hematoma might

rebleed spontaneously or after only slight trauma. If a hematoma rebleeds, the blood flow puts pressure on the brain and the result is respiratory arrest and brain death unless the patient is placed on a respirator and the swelling in the brain is decreased. He opined that if a baby fell from a standing position and struck her head on the floor, there would be enough force to cause the rebleed of a chronic subdural hematoma, and that is what occurred in this case. Finally, he stated that based upon a reasonable degree of medical certainty, it is entirely possible that the injuries that resulted in the victim's death were accidental.

On cross-examination, Dr. Blum acknowledged that it was possible that the bruises on the baby's body were of a nonaccidental nature. The witness agreed

that the existence of a skull fracture accompanied by a subdural hematoma indicated a blow of considerable force. He stated that when he performed the autopsy, he did not observe the .7 inch linear skull fracture Dr. Kalelkar located, and he based his opinion as to the cause of death on his own findings. However, he testified that the existence of the skull fracture did not alter his opinion regarding cause of death.

In rebuttal, the State called Pamela Vraney, who testified that in May of 1987, she noticed a bruise on Amy's face. She stated that the defendant told her she had fainted in the kitchen while carrying Amy and that the baby must have hit the table or the chair leg. Vraney said the defendant told her she was going to see a social worker from the adoption agency in a few days and was worried the

social worker would see the bruise.

The State called Dr. Haller, a neuropathologist, who examined Amy's brain and spinal cord and reviewed the autopsy reports of other physicians. She testified that old subdural hemorrhages rebleed more frequently in adults than in children. She also stated that the fall described by the defendant would not generate enough force to create the fracture Amy sustained, whether the fracture was to the occipital bone or the parietal bone. Further, the doctor opined that the force of such a fall was not sufficient to cause the old subdural to rebleed.

The State also called Dr. Mary Ann Radkowski, whose specialty is pediatric neuroradiology. After viewing several CAT scans of Amy's head and neck, the doctor testified that the old subdural

hematoma did not rebleed into the area of the fresh hematoma. She explained that tremendous force would be required to cause a subdural hematoma in the area where the fresh hematoma was located, and that the hematomas were in different compartments of the brain and bleeding does not usually spread outside the compartment. The witness also testified that blood had collected in the subarachnoid space outside Amy's brain and in the ventricles, which are sac-like structures containing cerebral-spinal fluid in the brain. She opined that rebleeding of an old hematoma did not cause the collection of blood, but that it was the result of severe trauma. Dr. Radkowski further testified that a fall on a linoleum floor would not generate enough force to cause the injuries suffered by the baby in this case.

Dr. Robert Kirschner, the deputy chief medical examiner in Cook County, testified over defense objection. He testified that a fall such as that Amy experienced would not create a skull fracture, bleeding in the subarachnoid space, or bleeding in the ventricles. He stated that such injuries would result from severe blunt head trauma. The doctor observed the autopsy while it was being done and testified that he observed a fracture of the parietal bone in the left occipital region of the skull. In his opinion, the fall did not cause the old subdural to rebleed, and even if it had, it would be unlikely to have caused death.

On cross-examination, Dr. Kirschner acknowledged that the fracture was not in the occipital bone as Dr. Kalelkar stated in the autopsy protocol. He also stated

that several studies have determined that when a skull fracture and subdural hematoma are present in a child Amy's age, statistically, the chances of the injuries being caused by abuse are 95%. The doctor stated that the degree of brain injury Amy suffered is far out of proportion to what would occur from a rebleed of a subdural hematoma.

In surrebuttal, Dr. Blum testified that Dr. Kalelkar's autopsy protocol made no mention of bleeding in the ventricles or subarachnoid space. He repeated that in his opinion, a fall sustained by a baby with a chronic subdural hematoma could result in rebleeding of the hematoma and death. The doctor stated that the older hematoma was in a stage of healing which made it highly susceptible to rebleeding, and that removal of fluid from the area could cause further

subdural bleeding. He also acknowledged that the fluid removed from the area where the older subdural hematoma was located did not indicate rebleeding.

Following the presentation of the evidence, the defendant's motion for directed verdict was denied and the case went to the jury. The jury found the defendant guilty of murder, and she was sentenced to a term of 20 years' imprisonment. This appeal followed.

The defendant contends it was error for the trial court to allow the State to present evidence of prior acts of abuse directed against the victim and the defendant's son, even though the court instructed the jury that the evidence was to be considered only to establish the defendant's intent or the absence of accident or mistake with regard to the baby's death. Specifically, the

defendant argues that it was improper for Pamela Vraney to testify about the defendant's treatment of Justin during the pool damage incident, and it was improper for the State to inquire of her about the facial bruise the baby sustained several months earlier and the defendant's explanation for the manner in which it was sustained.

Evidence of other crimes, wrongs, or acts is inadmissible if it only tends to establish the defendant's propensity to commit crimes. (People v. Milner (1984), 123 Ill. App. 3d 656.) Such evidence is admissible for numerous other purposes such as proof of motive, intent, knowledge, or absence of mistake or accident. Evidence of other acts or crimes may thus be received, if relevant, for any purpose other than to show mere propensity unless the court determines

the probative value of the evidence is substantially outweighed by the risk that admission will unduly prejudice the defendant. (People v. Grolean (1987), 156 Ill. App. 3d 742.) The trial court's decision with respect to admissibility of other crimes evidence will not be overturned unless there is a clear abuse of discretion. People v. Funches (1978), 59 Ill. App. 3d 71.

The defendant argues that Pamela Vraney's testimony was irrelevant, about a remote incident, and served only to inflame the jury. We disagree. The testimony regarding the defendant's abusive actions toward Justin provided information about the defendant's temperament and her previous reactions when a child of hers frustrated or angered her, and it was therefore relevant. The uncharged incidents of

abuse were also relevant to prove the defendant's intent and to establish lack of mistake or accident. As the State noted, there are often no eyewitnesses to acts of child abuse, which renders it difficult to identify through direct evidence the perpetrator or the exact cause of death. Instead, guilt must often be established through circumstantial evidence which may include proof of a pattern of repeated beatings or injuries. Accordingly, under the totality of the circumstances presented, we cannot say that the trial court's decision to admit the evidence of other acts or wrongs was a clear abuse of discretion. Furthermore, Pamela Vraney's testimony that the defendant told her that Amy's face was bruised because she fainted in the kitchen while carrying the baby was elicited in response to the

defendant's denial that she fainted in the kitchen. Thus, Vraney's testimony about the defendant's explanation of her fainting and the bruise Amy sustained was proper impeachment.

The defendant also contends that the court erred when it precluded her from impeaching Pamela Vraney by introducing evidence of litigation pending between their respective husbands. In an offer of proof, Vraney testified that Ron Blommaert, the defendant's husband, performed unsatisfactory masonry work on the Vraney home and as a result, Vraney's husband filed a civil lawsuit and a complaint with the Attorney General's office. Vraney admitted that she prepared and filed the necessary papers, but did not sign them because she had school-aged children and might not be able to appear in court. She further

stated that she and her husband had been friends with the Blommaerts, but they no longer had any relationship, good or bad. The court refused to allow the defendant to introduce this evidence during Vraney's cross-examination, and the defendant contends this ruling improperly limited her right to establish bias or interest on the part of the witness.

In criminal proceedings, the accused has the right to question a witness concerning matters which explain, qualify, discredit or destroy what he or she said on direct examination. Although the scope of cross-examination is generally within the trial court's sound discretion, the widest latitude should usually be allowed the defendant on cross-examination for the purpose of establishing bias, interest, or motive.

(People v. Gonzalez (1984), 104 Ill. 2d 332.) We agree with the defendant that she should have been permitted to question Vraney about the pending litigation and the claim filed with the Attorney General. Even though the witness did not sign the documents, the fact that she prepared them for her husband's signature and that she acknowledged her friendship with the Blommaerts had terminated as a result of the dispute indicates that this is a matter which might have colored her testimony. Therefore, inquiry into this matter should not have been foreclosed.

Improper restrictions on the scope of cross-examination constitute reversible error only if there was a clear abuse of the trial court's discretion which resulted in a manifest prejudice to the defendant. (People v. Larson (1980), 82

Ill. App. 3d 129.) We find that the undue restriction on the witness's cross-examination in this case does not rise to the level of reversible error. The defendant was otherwise given wide latitude in her cross-examination of the witness, and her testimony established that she was upset about the damage to their pool and the Blommaerts' refusal to pay for the damage. While introduction of evidence regarding the lawsuit and the claim with the Attorney General would have been proper, we find the trial court's decision to exclude that evidence did not result in manifest prejudice to the defendant.

Furthermore, as is often stated in Illinois law, a defendant is entitled to a fair trial, not a perfect one. (People v. Jackson (1986), 145 Ill. App. 3d 789, 795.) A conviction will not

automatically be reversed merely because error was committed at trial because trial error may be harmless if it is consequential or if it appears that it did not affect the outcome of the trial. (People v. Hunter (1984), 124 Ill. App. 3d 516.) On review, the appellate court's purpose is not to determine whether the record is completely free from error, but whether any error occurred which prejudiced the defendant or which unduly affected the outcome below. (People v. Miles (1986), 151 Ill. App. 3d 485.) Upon a careful review of the record, we find that any error was harmless beyond a reasonable doubt, and neither reversal of the defendant's conviction nor a new trial is required. People v. Foley (1982), 109 Ill. App. 3d 1010.

The defendant's next assignments of

error arise out of events which took place after the evidence was heard and prior to the rendering of the verdict. Judge Penn, who presided over the trial, informed the jury after closing arguments were made that he was late for a prior commitment and that Judge Bolden would therefore instruct the jury as to the law. During the course of its deliberations, the jury sent a note requesting that the autopsy slides which had been admitted into evidence be provided for further review. After hearing the arguments of counsel, Judge Bolden sent the slides and a projector to the jury room. The defendant now claims she was denied a fair trial because Judge Penn inexplicably absented himself from the courtroom, which prejudiced the jury, and because Judge Penn's absence caused Judge Bolden to make an erroneous

decision to submit autopsy slides to the jury which served no purpose other than arouse the jury's passion and prejudice. We disagree with both of the defendant's allegations.

Judge Penn did not inexplicably absent himself and leave the courtroom unsupervised. Rather, after he heard all the evidence and arguments and ruled on jury instructions, he informed the jury that he had a prior commitment and left Judge Bolden to read the jury instructions. The cases cited by the defendant are not relevant because in those cases, the trial judges left the courtroom during closing argument and the proceedings continued unsupervised, while in the case before us, Judge Bolden presided over the proceedings after Judge Penn departed. The defendant admits that Judge Penn's absence had an unknown

effect on the jury, but presumes it somehow prejudiced the jury. There is no indication in the record that the change in judges affected the jury and there is no reason to presume prejudice in this situation. We find there was no reversible error.

The defendant contends Judge Bolden's decision to allow the autopsy slides to go to the jury was prejudicial and constituted fatal error. She asserts that the slides were graphic and inflammatory, and that the only purpose for submitting them to the jury was to confuse, inflame, and prejudice the jurors. Again, we disagree.

The allowance of exhibits to be taken to the jury room during deliberations is within the sound discretion of the trial court. (People v. Montague (1986), 149 Ill. App. 3d 332.) In reaching its

decision, the trial court is to balance the probative value against any prejudicial effect, and the decision will not be disturbed on appeal absent an abuse of the court's discretion. (People v. Williams (1983), 97 Ill. 2d 252, cert. denied (1984), 104 S.Ct. 2364, reh'g denied (1984), 104 S.Ct. 3563.) The slides in this case were graphic depictions of autopsy proceedings, however, they tended to establish the cause of death, the possible use of force, as well as the existence and location of the baby's wounds. The slides had been shown to the jury and admitted into evidence, and they corroborated and explained the extensive and often conflicting medical testimony. Furthermore, the slides were submitted to the jury only in response to a written request from the foreman. It

was well within the trial court's discretion to allow these slides to be sent to the jury room during deliberations.

Finally, the defendant urges this court to find she was not proved guilty beyond a reasonable doubt of the offense of first degree murder. Specifically, she asserts that several of the State's witnesses were biased, that they were impeached during cross-examination, that they disagreed on the location of the baby's skull fracture, and often could not support their opinions with references to scientific literature. She also contends the State failed to prove she was the only one present when the fatal blow was inflicted and further failed to rebut her theory of defense, that the baby's fall on the kitchen floor on October 12 caused the old subdural

hematoma to rebleed.

The evidence against the defendant in this case was solely circumstantial, so in order for this conviction to be sustained, her guilt must be so thoroughly established as to exclude every reasonable hypothesis of innocence. (People v. Garrett (1975), 62 Ill. 2d 151, 163.) That is, the circumstantial proof must be of a conclusive nature tending to establish that the accused and no one else committed the crime. (People v. Williams (1977), 66 Ill. 2d 478.) As is often stated, it is the function of the trier of fact to pass upon the question of the guilt or innocence of the accused, and in cases where the evidence is irreconcilably conflicting, it is the peculiar prerogative of the trier of fact to ascertain the truth. (People v.

Hammond (1970), 45 Ill. 2d 269.) When presented with a challenge to the sufficiency of the evidence, a court of review does not retry the defendant, but determines only whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

From a careful and thorough consideration of all of the evidence in this case, we are unable to say that there is a reasonable doubt as to the guilt of the accused or that the evidence failed to exclude every reasonable hypothesis of innocence. The conflicts in testimony and the issue of witness credibility were for the jury to resolve, and neither the defendant's personal attacks on the State's witnesses nor the citation to selected portions of the evidence leads this court to conclude

that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The verdict of the jury is supported by the evidence in the record. The trial court found no fault with the verdict and denied the defense motion for judgment notwithstanding the verdict. Our review of the record discloses no errors necessitating reversal.

Based on the foregoing, the judgment of the circuit court of Will County is affirmed.

Affirmed.

Wombacher, P.J., and Scott, J., concur.

APPENDIX B

App. 40

STATE OF ILLINOIS
THIRD DISTRICT APPELLATE COURT

Roger H. Johnson 1004 Columbus Street
815 434-5050 Ottawa, Illinois 61350

Be it Remembered, That, to wit: On the 11th day of July, 1989, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

3-88-0525
People of the State of Illinois,
Appellee,
vs.
Debbie Blommaert,
Appellant.

APPEAL FROM:
Will County
Hon. William R. Penn
87 CF 1218

Now on this day this cause coming on for hearing upon the petition for rehearing filed by Julius Lucius Echeles & Frederick F. Cohn, herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is therefore ordered by the Court that said petition for rehearing be and the same is hereby overruled and denied.

OPINION MODIFIED.

_____
Clerk of the Appellate Court

APPENDIX C

App. 41

69000

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035
December 5, 1989

Mr. Frederick F. Cohn
Attorney at Law
205 W. Wacker Dr., S#1515
Chicago, IL 60606

No. 69000 - People State of Illinois, respondent, v. Debbie Blommaert, petitioner. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 27, 1989.

No. 89-1276

FILED
APR 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

DEBBIE BLOMMAERT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Appellate Court Of Illinois,
Third Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the Appellate Court of Illinois, when affirming petitioner's conviction, correctly applied the harmless error analysis which this Court set forth in *Chapman v. California*, 386 U.S. 18 (1967), and applied to questions concerning the denial of the right to cross-examine for bias in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

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No. 89-1276

In The

Supreme Court of the United States

October Term, 1989

DEBBIE BLOMMAERT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Appellate Court Of Illinois,
Third Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully by the argument set forth herein, respondent does not believe petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

STATEMENT OF THE CASE

Petitioner, Debbie Blommaert, was found guilty of the first degree murder of her 10 month old adopted daughter and was sentenced to twenty years imprisonment. Petitioner's conviction was affirmed on appeal to the Appellate Court of Illinois, Third Judicial District, in *People v. Blommaert*, 184 Ill.App.3d 1065, 541 N.E.2d 144 (3rd Dist. 1989). Petitioner's Petition for Leave to Appeal to the Illinois Supreme Court was denied. Thereafter, petitioner filed the instant petition for writ of certiorari.

STATEMENT OF FACTS

A thorough summation of the evidence presented at petitioner's trial was included in the appellate court decision affirming petitioner's conviction. This summary of the facts appears in the appendix to the petition at pp. A-1 – A-23.

REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE APPELLATE COURT OF ILLINOIS, WHEN AFFIRMING PETITIONER'S CONVICTION, CORRECTLY APPLIED THE HARMLESS ERROR ANALYSIS WHICH THIS COURT SET FORTH IN *CHAPMAN v. CALIFORNIA*, 386 U.S. 18 (1967), AND APPLIED TO QUESTIONS CONCERNING THE DENIAL OF THE RIGHT TO CROSS-EXAMINE FOR BIAS IN *DELAWARE V. VAN ARSDALL*, 475 U.S. 673 (1986).

Petitioner, Debbie Blommaert, alleges that she was denied her right to confront prosecution witness Pamela

Vraney when the trial court prohibited cross-examination of Vraney on an issue which was offered to show bias. Petitioner was charged with having murdered her ten month old adopted daughter, Amy. In the state's case-in-chief, Vraney testified to a prior incident in which petitioner had abused petitioner's 4 year old son, Justin. This testimony was offered for the limited purpose of establishing petitioner's intent or absence of mistake with regard to Amy's death. Vraney also testified for the State in rebuttal, relating to a prior incident in which she had observed a bruise on Amy's face and petitioner's comments that petitioner was worried about a social worker seeing the bruise. *People v. Blommaert*, 184 Ill.App.3d 1065, 1069, 1071, 541 N.E. 2d 144, 147-149 (3rd Dist. 1989).

During cross-examination of Vraney, petitioner sought to question Vraney about a dispute between petitioner's husband and Vraney's husband concerning allegedly unsatisfactory masonry work performed by petitioner's husband on the Vraney home. As a result of this incident, Vraney's husband was engaged in a civil suit against petitioner's husband and had filed a complaint with the Illinois Attorney General's Office. Vraney admitted that she prepared and filled the necessary papers for the suit, but did not sign them because her duties at home might prevent her from appearing in court. Vraney also stated that prior to this incident she and her husband had been friends with petitioner and her husband, but they no longer had any relationship, good or bad. The trial court did not allow cross-examination on this issue because the civil suit was between Vraney's husband and petitioner's husband. *People v. Blommaert, supra*, 184 Ill.App.3d at 1074, 541 N.E.2d at 150.

On direct appeal of the conviction the Illinois Appellate Court found that this limitation on cross-examination was error. However, upon review of the record the appellate court found that the error was harmless. Petitioner now alleges that the appellate court utilized an improper standard when reviewing this error and, therefore, urges this Court to grant certiorari. An examination of the appellate court's decision reveals that the granting of certiorari is unnecessary in this case. The appellate court applied the correct harmless error standard.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court held that not all federal constitutional errors automatically entitled a defendant to a reversal of his or her conviction. 386 U.S. at 22. This Court held that such error could be found harmless, however, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24. In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), this Court addressed the applicability of the *Chapman* harmless error standard to cases involving denial of a right to cross-examine for bias. This Court found that the denial of the opportunity to cross-examine an adverse witness for bias does not fit within the limited category of constitutional errors that are deemed prejudicial in every case. 475 U.S. at 672. This Court went on to state: "Accordingly, we hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say

that the error was harmless beyond a reasonable doubt." 475 U.S. at 684.

In addressing petitioner's allegation that she was improperly denied the opportunity to cross-examine Vraney concerning bias, the appellate court stated: "Upon a careful review of the record, we find that any error was harmless beyond a reasonable doubt, and neither reversal of defendant's conviction nor a new trial is required." *People v. Blommaert*, *supra*, 184 Ill.App.3d at 1075, 541 N.E.2d at 151. In support of this holding, the appellate court cited the decision in *People v. Foley*, 109 Ill.App.3d 1010, 441 N.E.2d 655 (2nd Dist. 1982). The *Foley* decision also dealt with the denial of a right to cross-examine a witness concerning bias. While *Foley* predated *Van Arsdall*, the *Foley* court had applied the *Chapman* standard to the denial of the right to cross-examine concerning bias. "The standard of review of an error affecting a Federal constitutional right is whether it was harmless beyond a reasonable doubt, that is, whether there is a reasonable possibility that the error might have contributed to the accused's conviction. . . . *Chapman v. California* (1967), 386 U.S. 18[.]" *People v. Foley*, *supra*, 109 Ill.App.3d at 1016, 441 N.E.2d at 659-60. By the plain language of its decision and by its reliance on *Foley*, the appellate court in affirming petitioner's conviction applied the *Chapman* harmless error standard, just as this Court instructed in *Van Arsdall*. Thus, petitioner's argument that an improper standard of review was utilized by the appellate court has no merit.

In light of this plain reliance on the appropriate standard, petitioner's argument that an inappropriate standard was applied is presumably based upon the fact

that the appellate court did not specifically enumerate its findings with respect to certain factors set forth in *Van Arsdall*. After finding that the *Chapman* harmless error analysis was applicable to the denial of the right to cross-examine a witness concerning bias, this Court went on to state: "Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall, supra*, 475 U.S. at 684.

This Court did not hold, or even suggest, that a reviewing court must detail its findings with respect to each of these five factors in any opinion addressing the denial of the right to cross-examine for bias. This language from *Van Arsdall* merely indicates what factors should be considered and demonstrates that these factors are susceptible to appellate review. When an appellate court states that it has made a careful review of the record and has found that there is no reasonable possibility that the error contributed to a defendant's conviction, the defendant has had the benefit of the review mandated by *Van Arsdall*. Through the language of its decision and through its reliance on *People v. Foley*, the appellate court has made exactly this statement in the instant case.

Nonetheless, petitioner sets forth the five factors listed in *Van Arsdall* and argues that upon considering these factors the appellate court should have found in her

favor. While respondent disagrees with petitioner's assessment of these factors, the relative merit of the arguments with respect to these factors is irrelevant to the question before this Court. Petitioner has petitioned for certiorari on the claim that the wrong test was applied – not on the clajm that the right test was applied but the wrong result achieved.

While the appellate court held that petitioner was erroneously denied the right to cross-examine Vraney concerning bias, that error does not automatically entitle petitioner to a new trial. Upon reviewing that error the appellate court applied the standard mandated by this Court and found the error was harmless beyond a reasonable doubt. Because the appellate court applied the correct standard for review, this Court should deny certiorari.

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition for Certiorari filed in this cause.

Respectfully submitted,

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No. 89-1276

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DEBBIE BLOMMAERT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, THIRD JUDICIAL DISTRICT

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1.

The Appellate Court applied an improper standard to the limitation on defendant's right of confrontation.

The issue before this Court is whether a State reviewing court applied the

standard as set forth by this Court in Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674, 106 S.Ct. 1431 (1986), in evaluating the limitation on the right of confrontation. The answer is no.

The Appellate Court applied the standard specifically rejected by this Court in Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674, 106 S.Ct. 1431 (1986). The Appellate Court, in concluding there had been limitation of cross-examination as to the witness' bias, held there was no need to reverse, because:

> "We find the trial court's decision to exclude that evidence did not result in manifest prejudice to the defendant." (App. 30)

This standard was specifically rejected by this Court in Delaware v. Van

Arsdall. There, this Court stated:

> "The State somewhat tentatively suggests that a defendant should have to show 'outcome determinative' prejudice in order to state a violation of the Confrontation Clause: Unless the particular limitation on cross-examination created a reasonable possibility that the jury returned an inaccurate guilty verdict, that limitation would not violate the Confrontation Clause. We disagree. While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole, see, e.g., Strickland v Washington, 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984) (ineffective assistance of counsel), the focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to 'confront[ation]' because use of

> that right would not have affected the jury's verdict." 89 L.Ed.2d at 683-84. (Emphasis added.)

Where there has been a denial of the right of confrontation by limiting evidence of bias, to determine whether the limitation causes a constitutional violation requiring a new trial, the reviewing court must consider

> "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." 89 L.Ed.2d at 686-87.

The State Appellate Court did not consider any of these factors.[1]

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1. The Appellate Court stated:

> "Furthermore, as is often stated in Illinois law, a defendant is entitled to a fair trial, not a perfect one. (People v. Jackson (1986), 145 Ill. App. 3d 789, 795.) A conviction will not automatically be reversed merely because error was committed at trial because trial error may be harmless if it is consequential or if it appears that it did not affect the outcome of the trial. (People v. Hunter (1984), 124 Ill. App. 3d 516.) On review, the appellate court's purpose is not to determine whether the record is completely free from error, but whether any error occurred which prejudiced the defendant or which unduly affected the outcome below. (People v. Miles (1986), 151 Ill. App. 3d 485.) Upon a careful review of the record, we find that any error was harmless beyond a reasonable doubt, and neither reversal of the defendant's conviction nor a new trial is required. People v. Foley (1982), 109 Ill. App. 3d 1010."

The Appellate Court did not discuss the factors relevant to the standard enunciated in Van Arsdall, even though this Court's decision in Van Arsdall predated the opinion of the Appellate Court by more than three years. Instead, the State reviewing court merely referred to general principles of how defendant does not have a right to a perfect trial, and made a general reference to finding the evidence harmless beyond a reasonable doubt, with no discussion of the issues this Court held to be vital for consideration.

Surely, the general reference to "harmless beyond a reasonable doubt" and citation of People v. Foley, a case that predated this Court's Van Arsdall opinion by four years, does not prove application of the proper standard.

Additionally, the Appellate Court's reliance on these totally inapplicable cases, (see Original Petition, pp. 17-18), and its failure to discuss the issues this Court held relevant in Delaware v. Van Arsdall, supra, demonstrate it did not apply the proper standard.[2]

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2. If the Appellate Court had applied the proper standard in this case, the result would have been a finding that the improper limitation on cross-examination was, indeed, harmful and not harmless error. See pp. 19-28 of the Petition for Certiorari, explicating how application of the proper standard results in a finding of prejudicial error. In sum: Application of a proper constitutional standard demonstrates the error could not be harmless because: (a) the evidence of guilt was all circumstantial; (b) it was, at most, very weak; (c) the evidence of this witness was crucial in that it was the only evidence of other prior bad acts toward her child and the sole evidence of "consciousness of guilt"; (d) the limitation of cross-examination was extensive, it related to her assisting in a lawsuit against defendant and her husband and was evidence of motive for the witness to fabricate. The State (Footnote continued)

CONCLUSION

For the reasons set out in the Petition for Certiorari, as amplified by this Reply, certiorari should be allowed so that this Court may (a) consider the duty of a State reviewing court in assessing a claim of limitation of cross-examination and confrontation; and/or (b) remand this cause with directions that the Appellate Court reconsider the issue in the light of the constitutional mandate of this Court in Van Arsdall, supra.

Respectfully submitted,

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erroneously infers (Resp. Br., p. 3) that the witness testified before the jury as to evidence relating to her bias. Such testimony occurred out of the jurors presence.